

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 25-98 and  
DECERTIFICATION NO 2-98:

LABORERS INTERNATIONAL UNION )  
OF NORTH AMERICA, LOCAL NO. 254, )  
Complainant, )  
STEVE LODHAL, )  
Petitioner, )  
(DC 2-98) )  
vs. )  
STATE OF MONTANA, DEPARTMENT OF )  
ADMINISTRATION , CENTRAL MAIL )  
BUREAU, )  
Defendant. )

**FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
AND RECOMMENDED ORDER**

\* \* \* \* \*

**I. INTRODUCTION**

Complainant, Laborers International Union of North America, AFL-CIO, Local No. 254, filed an unfair labor practice charge on February 6, 1998, alleging the Defendant, Department of Administration, Central Mail Bureau, was violating § 39-31-401(5) and (1), MCA, by not providing information germane to wages and classification necessary for the Union to bargain and represent its members.

On February 23, 1998, Steve Lodhal, a member of Laborers International Union of North America, AFL-CIO, Local No. 254, filed an objection to the conduct of a decertification election conducted on February 17, 1998. Lodhal charged the Defendant with failure to provide basic information relevant to bargaining. He based his election challenge on the Defendant's verifying

1 which members of the collective bargaining unit had voted during  
2 the representative election, the Defendant's alleged  
3 discrimination against Union supporters in pay upgrade training,  
4 and the Defendant's circumvention of the collective bargaining  
5 representative by attempting to get a pay upgrade for unit  
6 members. He contends these occurrences are sufficient basis to  
7 block the results of Decertification Election 2-98. The Union  
8 was decertified by a one vote margin in that election.

9 Joseph Maronick, Hearing Officer, conducted a hearing on  
10 July 20, 1998. Parties present, duly sworn and offering  
11 testimony included Union witnesses Christian MacKay, Union  
12 Business Manager; Wayne Guccione, Mail Clerk and Union Shop  
13 Steward; Dennis McAlpin, Mail Clerk and Substitute Shop Steward;  
14 and, Mark Olson, Mail Clerk. Defendant witnesses included Ward  
15 Stiles, Research Supervisor, Department of Labor and Industry;  
16 Bob Liffing, Research and Analysis Officer, Department of Labor  
17 and Industry; Kevin McRae, Labor Relations Specialist, Department  
18 of Administration; and Jennifer Jacobson, Election Judge,  
19 Employment Relations Division, Department of Labor and Industry.  
20 Ward Stiles and Bob Liffing were represented by counsel for the  
21 Department of Labor and Industry, Kevin Braun. Reid L. Gardiner,  
22 Bureau Chief, Central Mail, was present throughout the hearing.  
23 Steve Lodhal, the Mail Clerk who filed the decertification  
24 petition, was present throughout the hearing. Counsel Karl  
25 Englund represented the Union and Counsel Vivian Hammill  
26 represented the Defendant. Exhibits 1 through 11 were admitted  
27 into the record without objection. Administrative notice without  
28 objection was taken of the charges filed, charge response, the

1 investigation report and determination, motion and motion  
2 response, motion ruling, and all process and service documents.  
3 The parties concurrently submitted post-hearing memorandum of  
4 argument on September 11, 1998.

5 **II. FINDINGS OF FACT**

6 1. The Union and the Defendant engaged in contract  
7 negotiations beginning in March 1997. The Union sought to move  
8 the mail clerks from the statewide classification pay plan,  
9 § 39-18-312 (pay plan 60), MCA, to the blue collar plan,  
10 § 39-18-314, MCA.

11 2. The statewide classification pay rates are controlled  
12 by the legislature which may use an analysis of the labor market  
13 in a Department of Administration salary survey. The Department  
14 hired a local accounting firm, Anderson & Zurmuehlen (A & Z), to  
15 conduct the salary survey. The contract with A & Z included a  
16 requirement that all raw data, including employer names, be  
17 included in an electronic data base and delivered to the  
18 Department. A & Z advised all employers surveyed when soliciting  
19 their survey response that their identities would be "kept  
20 strictly confidential." A & Z compiled the salary survey report  
21 and delivered it to the Defendant. A & Z maintained the  
22 confidentiality of employers surveyed.

23 3. The names of the employers surveyed were provided to  
24 A & Z from the State Unemployment Insurance Contribution records.  
25 The employers surveyed received a letter from the Governor before  
26 and after survey participation informing the employers that the  
27 information provided, including their identification, would  
28 remain confidential (Exhibit 8, 9 and 10).

1           4.     During negotiations, the Union asserted the  
2 classification pay plan did not reflect the type and quality of  
3 work performed by the Union members. The Defendant contended  
4 that the salary survey supported the classification pay plan. On  
5 July 2, 1997 the Union asked orally for a list of the public and  
6 private employers who participated in the salary survey. On  
7 July 20, 1997, the Department told the Union it did not have that  
8 information but would check with A & Z. On about August 2, 1997,  
9 the Defendant advised the Union it did not have and could not get  
10 the employer information requested. The Union representative  
11 responded by saying, "I understand but don't agree." (MacKay  
12 deposition page 15, lines 6 - 7). The Defendant informed the  
13 Union that it felt the information was proprietary (MacKay  
14 deposition, page 11, lines 16 - 19). On October 14, 1997, the  
15 Union asked for the names of the employers in a letter to the  
16 State. The State responded on November 5, 1997, indicating that  
17 A & Z had assured employers their survey participation identity  
18 would be held in confidence. Thereafter, during continuing  
19 investigation into this matter, the Union discovered the  
20 Defendant contract with A & Z which required A & Z to provide the  
21 employer names. The Union was not aware of the terms of the A &  
22 Z contract prior to filing the ULP charge. The Union did not at  
23 any time believe the Defendant actually had the information  
24 requested or had not made an effort to obtain the employer names  
25 from A & Z. The Union considered the identities of the employers  
26 surveyed information critical to negotiations. The Union wanted  
27 to know if such employers as UPS, Federal Express, and United  
28 Postal Service were included in the salary survey.

1           5.     The Union representative believed that the Defendant  
2 was at all times truthful when indicating it did not have the  
3 employer name information requested. The transfer of mail clerks  
4 to the blue collar plan was the Union's continuing effort during  
5 several years of bargaining negotiations. The Union considered  
6 the type and nature of the mail clerks' duties supported the  
7 change to the blue collar plan. The Union indicated in  
8 negotiations that the mail clerks should be paid what UPS,  
9 Federal Express, and Post Office workers are paid.

10           6.     The Defendant provided in negotiations the basis of its  
11 determination that the type and nature of work performed by the  
12 unit members was properly classified. This information was  
13 presented to the Union during negotiations. The Defendant relied  
14 upon the benchmark classification system and the corresponding  
15 pay assignment to the grade assigned to a classified position.  
16 The Defendant advised the Union that unit members could receive  
17 an increase in pay if they could show they were improperly  
18 classified. The Department advised the Union that if the type  
19 and nature of work performed by the unit members was not properly  
20 addressed by their classification designation, the unit members  
21 could file a classification appeal. The Department advised the  
22 Union that a change to the blue collar plan was not the proper  
23 method to address or remedy a type or nature of work issue.

24           7.     A decertification petition was filed January 9, 1998  
25 because negotiations were unsuccessful or stalled. An election  
26 was held on February 7, 1998 and the Union lost by one vote.  
27 During the election, the Defendant's observer began keeping a  
28 list of persons who had voted. When this action was observed by

1 the election judge, the record keeping stopped and the list  
2 thrown in the garbage can. The Union observer at the election  
3 did not see any person noticing the Defendant observer's record  
4 keeping and did not believe it influenced the election.

5 8. The decertification petition was filed requesting the  
6 election results should be set aside not because of the voter  
7 record keeping but because required "laboratory conditions" for  
8 the conduct of an election was destroyed as a result of the  
9 Department's failure to provide the employers' names. This  
10 failure allegedly seriously diluted the Union's effectiveness in  
11 negotiating and diminished a positive perception of the Union by  
12 the unit members. On or about December 30, 1997 a the Union  
13 member's bureau chief advised two Union member he was examining  
14 some paperwork regarding possible upgrade of mail bureau staff.  
15 He had also allegedly not allowed some upgrade training requests  
16 made by Union members.

17 The Union requests a bargaining order, a finding that the  
18 Defendants committed an unfair labor practice, an order requiring  
19 the Department to provide the Union with the employers' names,  
20 and an order requiring the Department to post a notice of the  
21 unfair labor practice charge finding decision that the delay in  
22 reaching an agreement was the result of the failure of the  
23 Department, not the Union.

### 24 **III. DISCUSSION**

25 Montana law requires filing of an unfair labor charge within  
26 six months of the violation. §39-31-404, MCA. When the  
27 Department advised the Union on July 22, 1997 that it did not  
28 have the employer names, the Union did not press the Department

1 for production of the information. The refusal to provide the  
2 information (the alleged ULP) did not occur until the Department  
3 responded to the October 14, 1997 letter on November 5, 1997  
4 (Exhibits 1 and 2). The charge was filed in February 1998,  
5 within the six month filing period.

6 Section 39-51-603(3), MCA, prohibits release of employer  
7 names except to public employees. The State Research and  
8 Analysis staff testified that the release of the names of  
9 employers to the Union would violate § 39-51-603(3), MCA. The  
10 Union pointed out the inconsistency in the Department's reliance  
11 upon § 39-51-603(3), MCA. A & Z is not a "public employee" and  
12 yet were provided confidential information, employer names, from  
13 the Unemployment Insurance records which were used to conduct the  
14 survey.

15 The Union had an idea of the employer name and salary  
16 information requested independent of their request for that  
17 information from the Defendant. Without some knowledge of that  
18 rate, the Union would not have given the survey salary rate any  
19 question. The Defendant did not have that information but did  
20 make an effort to obtain it from A & Z. The fact that the  
21 contract with A & Z required the transfer of that information is  
22 irrelevant to the charge of refusal to bargain in good faith.  
23 The Defendant did not withhold any information. If the Union did  
24 not have the information, UPS, Federal Express, and U.S. Post  
25 Office salary rates, that information was available for them with  
26 a minimal effort of a phone call or two.

27 The Defendant in good faith addressed the type and nature of  
28 work issue raised by the Union. The Defendant's position and

1 advice to the Union was that to address pay or nature of work a  
2 classification appeal should be filed. That did not occur. The  
3 central issue and cause of frustration among the Union members  
4 was their pay, not the fact that the names of the persons  
5 surveyed were unavailable. A classification appeal, not an  
6 unfair labor practice charge, was the proper venue to remedy or  
7 address the type and nature of work problem. Section 2-18-  
8 203(2), MCA provides that the grade assigned to a class is not an  
9 appealable through a classification appeal. The grade assigned  
10 to a class is what determines pay and pay rates for state  
11 employees are set by the legislature.

12 By the time the Union asked for the names of the employers,  
13 the Department had presented the survey information to the  
14 Legislature which granted a one percent across the board increase  
15 to all State employees, both blue collar and plan 60. The  
16 Department lacks the authority to grant pay increases to mail  
17 clerks or any other persons except in very limited pay exception  
18 circumstances. <sup>1</sup>

19 The challenge to the election conduct and the result is  
20 without basis. The Union observer agreed the action by the  
21 Department observer in keeping track of those who voted was not  
22 observed by any unit members and did not affect the election  
23 results. The fact the names of the surveyed employers was not  
24 provided is insufficient to support the unfair labor practice  
25 charge. Insufficient information was offered regarding the  
26 independent examination of job descriptions or other employee

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27  
28 <sup>1</sup>To mitigate problems with difficult recruitment, retention,  
promotion, demotion, transfer, and other circumstances (MOM  
Policy 3-0505-1827 - Pay Plan Exceptions).

1 records by the mail clerk supervisors regarding pay upgrades or  
2 the alleged discrimination against unit members relating to  
3 upgrade training to block the election results.

4 The requirement of good faith bargaining is outlined in  
5 Volume 1, 3rd Edition, Patrick Harden, Developing Labor Law, page  
6 608-610 (1992), as follows:

7 The Board and the courts recognized at an early  
8 date that simply compelling the parties to meet  
9 was insufficient to promote the purposes of the  
10 Act.<sup>2</sup> Early attempts by employers to satisfy the  
11 bargaining obligation by merely going through the  
12 motions without actually seeking to adjust  
13 differences were condemned.<sup>3</sup> The concept of "good  
14 faith" was brought into the law of collective  
15 bargaining as a solution to the problem of  
16 bargaining without substance.<sup>4</sup> In 1947 Congress  
17 explicitly incorporated the "good faith"  
18 requirement into section 8(d).

19 A. Totality of Conduct Assessed: *General*  
20 *Electric* and the Proper Roles of the Parties

21 The duty to bargain in good faith is an  
22 "obligation . . . to participate actively in the  
23 deliberations so as to indicate a present  
24 intention to find a basis for agreement . . . ."<sup>5</sup>  
25 This implies both "an open mind and a sincere  
26 desire to reach an agreement"<sup>6</sup> as well as "a  
27 sincere effort . . . to reach a common ground."<sup>7</sup>  
28 The presence or absence of intent "must be

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21 <sup>2</sup>NLRB, 1936 Annual Report 85.

22 <sup>3</sup>NLRB v. Montgomery Ward & Co., 133 F2d 676, 12 LRRM 508  
23 (CA 9, 1943); Benson Produce Co., 71 NLRB 888, 19 LRRM 1060  
(1946).

24 <sup>4</sup>Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev.  
25 1401, 1413 (1958).

26 <sup>5</sup>NLRB v. Montgomery Ward & Co., *supra*.

27 <sup>6</sup>See NLRB v. Truitt Mfg. Co., 351 US 149, 38 LRRM 2042  
(1956).

28 <sup>7</sup>NLRB v. Montgomery Ward & Co., *supra* note 154, at 686. See  
NLRB v. Herman Sausage Co., 275 F2d 229, 45 LRRM 2829 (CA 5,  
1960).

1 discerned from the record."<sup>8</sup> Except in cases  
2 where the conduct fails to meet the minimum  
3 obligation imposed by law or constitutes an  
4 outright refusal to bargain,<sup>9</sup> relevant facts of a  
5 case must be studied to determine whether the  
6 employer or the union is bargaining in good or bad  
7 faith. The "totality of conduct" is the standard  
8 by which the "quality" of negotiations is  
9 tested.<sup>10</sup> Thus, even though some specific  
10 actions, viewed alone, might not support a charge  
11 of bad-faith bargaining, a party's overall course  
12 of conduct in negotiations may reveal a violation  
13 of the Act.<sup>11</sup>

8 Because the Board considers the entire course of  
9 conduct in bargaining, isolated misconduct will  
10 not be viewed as a failure to bargain in good  
11 faith. Thus, an employer's withdrawal of  
12 tentative agreements, standing alone, does not  
13 constitute bad faith in contravention of the  
14 bargaining obligation.<sup>12</sup> In *Roman Iron Works*,<sup>13</sup>  
15 for example, the employer violated section 8(a)(5)  
16 by its unilateral wage increase during  
17 negotiations. The employer also engaged in hard  
18 bargaining including a reduction of the wage offer  
19 during bargaining, denial of a union request for  
20 employee addresses, insistence on a right to  
21 subcontract, and a demand for significant cost  
22 reductions. However, the Board found that the  
23 union, made complete contract proposals, and made  
24 several significant concessions. Under all of  
25 these circumstances, the Board found that the  
26 employer did not engage in bad-faith bargaining.<sup>14</sup>

18 In reviewing the totality of the employer's  
19 conduct, the Board also takes into consideration  
20 an employer's antiunion behavior away from the

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21 <sup>8</sup>General Elec. Co., 150 NLRB 192, 194, 57 LRRM 1491 (1964).

22 <sup>9</sup>Intent will not even be in issue if the outward conduct  
23 amounts to refusal to bargain. See *NLRB v. Katz*, 369 US 736,  
50 LRRM 2177 (1962).

24 <sup>10</sup>*B. F. Diamond Constr. Co.*, 163 NLRB 161, 64 LRRM 1333  
(1967).

25 <sup>11</sup>See, e.g., *NLRB v. Cable Vision*, 660 F2d 1, 108 LRRM 2357  
26 (CA 1, 1981).

27 <sup>12</sup>*Williams*, 279 NLRB 82, 121 LRRM 1313 (1986).

28 <sup>13</sup>275 NLRB 449, 119 LRRM 1144 (1985).

<sup>14</sup>*Roman Iron Works*, supra note 164.

1 bargaining table.<sup>15</sup> However, the Board has held  
2 that such conduct away from the table does not  
3 establish bad faith where there exists no other  
4 evidence that the employer failed to bargain in  
5 good faith.<sup>16</sup>

6 The record in this case shows the Defendant bargained in  
7 good faith. The Union request for the names of employers  
8 surveyed in a very broad sense was germane to the bargaining  
9 terms. The Defendant did not have that information but did make  
10 a reasonable effort to obtain the employer names. When the  
11 Defendant discovered the promise of A & Z to maintain the  
12 confidentiality of the names, that information was given to the  
13 Union. At all times, the Defendant made a reasonable and  
14 truthful effort relating to information exchanged. Any requested  
15 information which the Defendant had was freely given to the  
16 Union.

17 The inconsistency between the contract with A & Z and what  
18 it provided the Defendant and the law prohibiting the Department  
19 of Labor from providing names to a non-governmental agency, as  
20 occurred when A & Z was provided unemployment insurance employer  
21 names, and the letters from the Governor assuring confidentiality  
22 are not central to this unfair labor practice charge. The  
23 judgment relative to good faith bargaining rests with the  
24 exchange of information which the Defendant had. The Defendant  
25 did not bargain in bad faith.

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27 <sup>15</sup>NLRB v. Billion Motors, 700 F2d 454, 112 LRRM 2873 (CA 8,  
1983).

28 <sup>16</sup>Allbritton Communications Co. v. NLRB, 766 F2d 812,  
119 LRRM 3290 (CA 3, 1985).

1 IV. CONCLUSIONS OF LAW

2 1. The Board of Personnel appeals has jurisdiction over  
3 this matter under §§ 39-31-101 et sec, MCA and under  
4 implementation rules of ARM 24.26.601-685.

5 2. ULP 25-98 was filed within six months as required under  
6 § 39-31-404, MCA.

7 3. The Defendant bargained in good faith and did not  
8 violate §§ 39-31-401(5) and (1).

9 4. Decertification Election 2-98 was properly conducted  
10 and no reason found to block the election results.

11 V. RECOMMENDED ORDER

12 Unfair Labor Practice Charge 25-98 and Decertification 2-98 are  
13 without merit and HEREBY dismissed.

14 DATED this 8<sup>th</sup> day of December, 1998.

15 BOARD OF PERSONNEL APPEALS

16 By: Joseph V. Maronick  
17 Joseph V. Maronick  
18 Hearing Officer

19 NOTICE: Exceptions to these Findings of Fact, Conclusions of Law  
20 and Recommended Order may be filed pursuant to ARM 24.26.215  
21 within twenty (20) days after the day the decision of the hearing  
22 officer is mailed, as set forth in the certificate of service  
23 below. If no exceptions are timely filed, this Recommended Order  
24 shall become the Final Order of the Board of Personnel Appeals.  
25 § 39-31-406(6), MCA. Notice of Exceptions must be in writing,  
26 setting forth with specificity the errors asserted in the  
27 proposed decision and the issues raised by the exceptions, and  
28 shall be mailed to:

Board of Personnel Appeals  
Department of Labor and Industry  
P.O. Box 1728  
Helena, MT 59624-1728

1 \* \* \* \* \*

2 CERTIFICATE OF MAILING

3 The undersigned hereby certifies that true and correct  
4 copies of the foregoing documents were, this day served upon the  
5 following parties or such parties' attorneys of record by  
6 depositing the same in the U.S. Mail, postage prepaid, and  
7 addressed as follows:

8  
9 Karl Englund  
10 Attorney at Law  
11 401 N Washington  
12 Missoula MT 59801

13 The undersigned hereby certifies that true and correct  
14 copies of the foregoing documents were, this day, served upon the  
15 following parties or such parties' attorneys of record by means  
16 of the State of Montana's Interdepartmental mail service.

17  
18 Vivian Hammill  
19 Attorney at Law  
20 Department of Administration  
21 PO Box 200126  
22 Helena MT 59602-0126

23 DATED this 8<sup>th</sup> day of December, 1998.

24 Carol A. Larkin